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July 3, 2019

OML 2019 – 78

Nancy Glowa, Esq.
Cambridge City Solicitor
Office of the City Solicitor
795 Massachusetts Avenue
Cambridge, MA 02139

RE: Open Meeting Law Complaint

Dear Attorney Glowa:

This office received two complaints from Kim Courtney and Xavier Dietrich on February 19, 2019, and April 16, 2019, alleging that the Cambridge Board of License Commissioners (the “Board”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. The first complaint was originally filed with the Board on November 27, 2018, and the Board responded by letter dated December 12, 2018. The second complaint was filed with the Board on February 25, 2019, and the Board responded by letter dated March 14, 2019. The complaints allege substantially similar violations of the Open Meeting Law and, therefore, will both be addressed in this determination. Specifically, the complaints allege that the Board deliberated outside of a public meeting and approved Statement of Reasons letters that contained matters that were discussed outside of public meetings. Finally, the complaints allege that two of the Board’s members were not in compliance with the certification requirements of the Open Meeting Law at the time of the Board’s meetings at issue.¹

Following our review, we find that the Board violated the Open Meeting Law by deliberating outside of an Open Meeting in the course of preparing the November 19, 2019,

¹ The complaints contain other allegations, such as whether the Board sufficiently deliberated before taking certain actions and whether certain administrative decisions, like choosing dates of a suspension to be served, should have been decided by the Board. These questions turn on the fundamental issue of whether the Board and/or its members acted within the scope of its own authority. We note that, even if true, these allegations would not constitute a violation of G.L. c. 30A, §§ 18-25. Accordingly, we decline to review them. See OML Declination 1-25-16 (Nahant Housing Authority Board of Commissioners). The complaints also allege that the Statements of Reasons letters contain untrue facts based on false testimony given at a disciplinary hearing. The Open Meeting Law likewise does not govern this issue. The Division cannot ensure, and the Open Meeting Law does not require, that the statements made by individuals at meetings are factually true. See OML 2015-133. Finally, we will not address any allegations concerning the October 12, 2012, Disciplinary Notice as those allegations were untimely.

Statement of Reasons, but not with regard to the January 17, 2019, Statement of Reasons.² We also find that the Board took appropriate remedial action upon learning that Open Meeting Law Certification Forms were not on file for two members.

In reaching a determination, we reviewed the November 20, 2018, complaint, the Board's December 14, 2018, response, the February 19, 2019, request for further review, the April 3, 2019, further response by the Board and the Complainants' April 21, 2019, letter in response to the Board's further response. In addition, we reviewed the February 25, 2019, complaint, the Board's March 14, 2019, response, the April 16, 2019, request for further review and the Board's May 22, 2019, further response. We also reviewed a selection of Board meeting minutes from 2017 and 2018 in order to ascertain the length of time each Board Member had been attending meetings of the Board. Finally, we reviewed audio and video recordings of the November 7, 2018, and January 16, 2019, meetings of the Board, and spoke with Ms. Courtney and Mr. Dietrich by telephone on May 23, 2019.

FACTS

We find the facts as follows. The Board consists of three members: Chair Nicole Ferrer, Police Commissioner Branville Bard, Jr., and Acting Fire Chief Gerard Mahoney. Thus, any two members constitute a quorum.³ Elizabeth Lint is the Executive Director of the Board.

I. The November 7, 2018, Commission Meeting and First Statement of Reasons

At the November 7, 2018, meeting of the Board, Ms. Courtney and Mr. Dietrich, owners of UpperWest Cocktail Bar ("UpperWest"), participated in a disciplinary hearing after receiving notice regarding several alleged violations at UpperWest. The alleged violations are summarized as follows:

1. Impermissible use of candles in a restaurant.
2. Refusal to cooperate with Fire Department officials during an inspection.
3. Threatening/intimidating a witness.
4. Threatening a public official.

At the November 7, 2018, disciplinary hearing, the Board heard the testimony of Police Officer McGinty, Deputy Fire Chief Donovan and Fire Captain Arsenault who had been present at UpperWest for an inspection on September 29, 2018. Ms. Courtney and Mr. Dietrich cross-examined these witnesses. Ms. Courtney and Mr. Dietrich also testified on their own behalf and were questioned by the Board. In a contentious discussion, the Board also debated the meaning of certain Cambridge fire regulations with Ms. Courtney and Mr. Dietrich.

After about an hour, Chair Ferrer asked the other Board members if they were ready to vote. The Chair proposed finding violations on Counts 2-4 and imposing a suspension of 3 days on UpperWest's general on-premises license for the sale of alcoholic beverages. Board Members Bard and Mahoney indicated their concurrence. As reasons for issuing the suspension

² Although the two Statement of Reasons letters are undated, they are referred to here by the date on which they were emailed to the Board by either Ms. Lint or Chair Ferrer.

³ For the purposes of the Open Meeting Law, a quorum is a simple majority of the members of a public body. G.L. c. 30A, § 18.

Chair proposed that the two-day suspension for Count 1 should be served consecutively with the three-day suspension for Counts 2-4 for a total of a five-day suspension after the conclusion of the ABCC appeal. Board Members Bard and Mahoney indicated their concurrence.

Following the January 16, 2019, meeting, Chair Ferrer prepared a draft of a new Statement of Reasons summarizing the Board's actions at the latest meeting. Chair Ferrer then gave the draft of the new Statement of Reasons to Ms. Lint, who emailed it to the other two Board members. Ms. Lint's email did not indicate who had drafted the Statement of Reasons.⁴ In the past, both Ms. Lint and Chair Ferrer had drafted Statements of Reasons with the assistance of their notes and the audio recording of the hearing. The only response Ms. Lint received to her email was from Chief Mahoney, saying "Ok," which was sent only to her, on January 17, 2019.

At its January 30, 2019, meeting, the Board considered the Statement of Reasons that had been circulated and voted to approve it. On February 1, 2019, Christopher O'Neil, an administrative assistant to the License Commission Department, emailed the Statement of Reasons to Ms. Courtney and Mr. Dietrich. On or about February 25, 2019, Ms. Courtney and Mr. Dietrich filed their second Open Meeting Law complaint with the Board.

III. Open Meeting Law Certifications.

We separately note that Chair Ferrer filed a Certificate of Receipt of Open Meeting Law Material on January 11, 2016, shortly after she was appointed to the Board. Both Board Member Mahoney and Board Member Bard filed their Certificates of Receipt of Open Meeting Law Material on December 4, 2018. Mr. Mahoney has been a Board member since at least March of 2017 and Mr. Bard has been a Board member since at least February of 2018.

DISCUSSION

I. The Board Chair's email to the other board members circulating a draft Statement of Reasons that contained her opinions was a deliberation outside a public meeting.

The Open Meeting Law was enacted "to eliminate much of the secrecy surrounding the deliberations and decisions on which public policy is based." Ghiglione v. School Committee of Southbridge, 376 Mass. 70, 72 (1978). The Open Meeting Law seeks to balance the public's interest in witnessing the deliberations of public officials with the government's need to conduct its business efficiently. To that end, the law defines deliberation as:

[A]n oral or written communication through any medium, including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction; provided, however, that "deliberation" shall not include the distribution of a meeting agenda, scheduling information or distribution of other procedural meeting or the distribution of reports or documents that may be discussed at a meeting, provided that no opinion of a member is expressed. G.L. c. 30A, § 18.

Although it is clear that certain administrative tasks are excluded from the definition of "deliberation," that exception includes a strong caveat: such administrative communications are

⁴ Ms. Lint's email stated: "For your review. This will be on the 1/30 agenda."

permissible “provided that no opinion of a member is expressed.” G.L. c. 30A, § 18; OML 2013-5. For example, the distribution of minutes ahead of a public meeting is permissible as long as the minutes simply memorialize the deliberation that took place at a preceding open meeting. See OML 2013-127.

Email attachments are considered along with the body of an email when determining whether a public body member has expressed an opinion. See OML 2014-152. In addition, the expression of an opinion by one public body member on matters within the body’s jurisdiction to a quorum of a public body is considered a deliberation, even if no other public body member responds. See OML 2016-104; OML 2015-33; OML 2012-73.

Here, we find that the circulation of the November 19, 2019, draft Statement of Reasons by Chair Ferrer constituted deliberation among a quorum of Board members outside of a noticed meeting. To the extent that the draft simply memorialized the discussion that took place in the meeting, the circulation of the draft merely served an administrative purpose similar to circulating draft minutes. However, the Chair also added her conclusions about the relative credibility of the hearing testimony and admonishments of Ms. Courtney and Mr. Dietrich, neither of which was discussed at the November 7, 2018, meeting. By including these personal opinions in the Statement of Reasons and then circulating the draft Statement of Reasons to the other Board members outside of a noticed meeting, the Statement of Reasons became a vehicle for continuing the meeting’s discussion outside of a noticed meeting. Because the Statement of Reasons containing these opinions was sent by one Board member to a quorum of the Board, we find that this communication constituted deliberation outside of a meeting in violation of the Open Meeting Law.

In contrast, the January 17, 2019, Statement of Reasons was distributed to the other Board members without improper deliberation. This second Statement of Reasons carefully avoided any characterization of underlying facts and merely memorialized the actions taken by the Board at its latest meeting. Distribution of this second Statement of Reasons therefore more closely resembles the administrative task of circulating meeting minutes, which falls within an exception to the Open Meeting Law’s definition of deliberation. Therefore, we find that the dissemination of the second Statement of Reasons outside of a public meeting did not violate the Open Meeting Law.

Finally, we also note that, when Ms. Lint sent the second Statement of Reasons to the Board members, she did not ask for feedback, instead merely stating that the draft would be discussed at the next public meeting. Such a communication represents a best practice, because it does not encourage other Board members to give their opinions in a way that might constitute deliberation had they replied to all recipients of the email.

II. The Board took appropriate remedial action upon learning that Open Meeting Law Certification Forms were not on file for two members.

Finally, the complaint alleges that two Board members, Mr. Mahoney and Mr. Bard, did not timely complete the Open Meeting Law certification form. The Open Meeting Law requires that “within 2 weeks of qualification for office, all persons serving on a public body shall certify, on a form prescribed by the attorney general, the receipt of a copy of the open meeting law, regulations promulgated pursuant to section 25 and a copy of the educational materials prepared

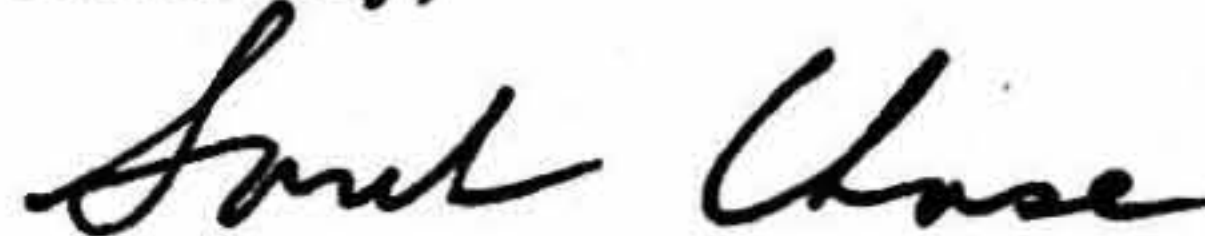
by the attorney general explaining the open meeting law and its application pursuant to section 19. ... The certification shall be evidence that the member of a public body has read and understands the requirements of the open meeting law and the consequences of violating it." See G.L. c. 30A § 20(h); OML 2011-39. The Open Meeting Law regulations further clarify that, upon a public body member's qualification for office, the municipal clerk shall provide the required materials to the public body member and the public body member shall sign the certification within two weeks thereafter. 940 CMR 29.04(1).

Here, it is unclear whether the Clerk had provided the Open Meeting Law materials to the Board members and they nonetheless did not sign the certification, or whether they never received the materials, or whether they did sign and submit their certifications but the certifications were not retained. Regardless, as soon as it became evident that the certifications for Mr. Bard and Mr. Mahoney were not on file with the Clerk's Office, both members filed their certificates with the Clerk's Office on December 4, 2018. We find that the Board took prompt remedial action in response to this complaint and we find no violation of the Open Meeting Law. See OML 2019-28.

CONCLUSION

For the reasons stated above, we find that Chair Ferrer violated the Open Meeting Law by deliberating outside of an Open Meeting. We order immediate and future compliance with the Open Meeting Law, and caution that similar future violations may be considered evidence of an intentional violation of the law. We now consider the complaints addressed by this determination to be resolved. This determination does not address any other complaints that may be pending with our office or the Board. Please feel free to contact the Division at (617) 963 - 2540 if you have any questions.

Sincerely,



Sarah Chase
Assistant Attorney General
Division of Open Government

cc: Kim Courtney and Xavier Dietrich
Cambridge Board of License Commissioners